U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

MAILED: 3/27/2001

IN THE MATTER OF:	*	
R. C. Tullis Claimant	*	
v.	*	Case No.: 2000-DCW-0010
Marlboro Construction Co. Employer	*	OWCP No.: 40-067973
and	*	
United Pacific Insurance Co. Carrier	*	

APPEARANCES:

Benjamin T. Boscolo, Esq.
For the Claimant

Kelly D. Vanstrom, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING MEDICAL BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), as extended by the provisions of the D.C. Workers' Compensation Statute, 36 D.C. Code 501, **et seq.**, herein jointly referred to as the "Act." The hearing was held on December 8, 2000 in Washington, D.C., at which time all parties were given the opportunity to present evidence and oral

arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit, JX for a Joint Exhibit and RX for an exhibit offered by the Employer/Carrier. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
JX 1	Parties' Joint Stipulations	12/08/00
CX 9	Attorney Boscolo's brief on behalf of the Claimant	01/05/01

The record was closed on January 8, 2001 upon filing of the official hearing transcript.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and Employer were in an employee-employer relationship at the relevant times.

3. On September 26, 1992, Claimant suffered an injury in the course and scope of his covered employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation.

The unresolved issues in this proceeding are:

1. Whether Claimant's right knee problems are causally

related to his September 26, 1972 work-related injury?

2. If so, whether his need for right knee surgery is also causally related to such injury.

Summary of the Evidence

R.C. Tullis ("Claimant" herein), was injured and almost killed in a devastating accident on September 26, 1972 during a ditch cave-in at a construction site while working for the Employer on a pipe laying project in the District of Columbia at 12th and "N" Streets, in the Northwest section of Washington, D.C.. He became stuck between the pipe and manhole plate and when the plate vibrated loose, it struck Claimant and he sustained extensive damage to multiple body parts, Claimant remarking that he would have been crushed to death but for his large body frame. He was taken to G.W. Hospital and he has been extensively treated since then by Dr. Harvey N. Mininberg, a Board-Certified orthopedic surgeon and whose records relating to his treatment of Claimant between December 14, 1972 and October 23, 2000 are in evidence as CX 1.

Claimant's voluminous medical records with Dr. Mininberg are best summarized by the December 14, 1972 report of the doctor (CX 1):

HISTORY: On September 26, 1972 while at work for the Marlboro Construction Company on a job at 12th and N Streets, N.W. Washington, D.C., the patient was injured in a cave-in while laying pipe in an excavation. The patient states that he was bending over and was struck in the low back and the force drove his left foot into the ground. The patient was taken by ambulance to George Washington University Hospital where numerous x-rays were obtained. The patient states that he had sustained a fractured pelvic, dislocated left hip and cracked right hip. He was in traction for 59 days and was discharged from the hospital December 1, 1972. The patient is presently under the care of Dr. Brantley P. Vitek. He is ambulating with crutches and the left leg is braced.

The patient states that he notes pain in the left foot and ankle, radiating up to the area of the knee. He has been told that he has a "drop foot" and notes excessive swelling in the foot and ankle which, he states, is due to nerve damage. He cannot move the great toe or ankle. The patient notes pain in the area of the left hip after prolonged periods of sitting and states that he notes a grinding sound with motion.

PHYSICAL FINDINGS:

General Examination: On examination the patient ambulates with crutches and a drop-foot brace on the left leg. He has a full range of motion to the left hip except for external and internal rotation, which are limited to about 15-20**N**.

Neurovascular Examination: Neurovascular examination shows decreased left ankle jerk with the left foot held in a 20**N** below neutral position, and he can plantarflex to 40**N**, but can only dorsiflex to -20**N**. There appears to be some active extension powers to the lateral four toes, but not to the big toe. Sensation is intact across the dorsal and plantar aspects of the left foot.

X-RAY FINDINGS: X-RAY examination of the left hip shows an old fractured acetabulum.

DIAGNOSIS: Status post fracture dislocation, left hip. Status post sciatic nerve injury with left drop-foot.

TREATMENT: The patient was advised to continue with the use of the drop-foot braces and crutches, non-weight bearing, and we will see him back in one month, at which time we will re-x-ray him and begin progressive weight bearing. In addition I have asked him to obtain his medical records from George Washington including his EMG, and we will send him to Holy Cross Hospital to have an EMG of the left lower extremity performed in the meantime.

We will continue to keep you informed of this patient's progress, according to the doctor.

Dr. Mininberg and his associate, Dr. Joel D. Fechter, continued to see Claimant as needed and they timely sent reports to the Carrier to update Claimant's medical condition. For example, Dr. Mininberg sent the following letter to the Carrier on August 26, 1983 (CX 1):

This patient has been under my care for his status post fracture dislocation of the left hip and status post sciatic nerve injury with left drop foot which he sustained on the job September 26, 1972.

The patient was last seen in my office on November 5, 1982. At that time he was asymptomatic as far as the back and the hip were concerned and he had full mobility without discomfort.

Neurologic was intact. In view of his asymptomatic condition on full activities I felt that he need not return to the office unless he developed further specific difficulties, according to the doctor.

As of November 30, 1987 Claimant had been seen in the doctor's office 86 times. (CX 1)

Dr. Howard M. Silby, a neurologist, states as follows in his May 24, 1995 **Neurological Evaluation** (CX 2):

Mr. Tullis was reevaluated on May 16, 1995 stating that for the past three weeks he has had right leg pain and back pain and some left pelvic discomfort which is being treated by traction and physical therapy and is being also evaluated by Dr. Mininberg. His leg pain has been present in the past but it is getting more persistent and more severe.

Neurological reexamination showed the same findings as before with no real change.

Because of the additional complaint, a CT scan of the lumbar spine was accomplished to rule out a herniated disc or spinal stenosis. It showed the left-sided facet arthropathy at L3-4 and there was a question of a small herniation at this level. A similar lateral disc herniation question was raised at L4-5. When compared to the previous study of 1989, there was definite progression of disease at L3-4 on the left side.

COMMENT: The patient's symptoms continue to be due to his lumbar osteoarthritis which has progressed over the last six years. While there may be two small herniated discs, they are not enough to consider surgery at this time. Therefore, I do think it is appropriate to continue the physical therapy and conservative measures.

The patient will be seen again in six months, according to the doctor.

I note that Dr. Silby first saw Claimant on November 2, 1973. (CX 2)

Claimant's August 21, 1999 MRI of the right knee was read by Dr. Anil K. Narang as showing a tear, anterior horn of the lateral meniscus. (CX 3)

Dr. Fechter states as follows in his October 7, 1999 report (CX 1):

Mr. Tullis's right knee injury consisting of a tear of the anterior horn of his lateral meniscus as evidenced on his MRI SCAN has occurred as a result of his altered gait pattern secondary to his original work injury.

Please do not hesitate to contact me if I can be of further assistance, according to the doctor.

The Respondents referred Claimant for an examination by their medical expert, Dr. John B. Cohen, an orthopedic surgeon, and the doctor concluded as follows in his November 22, 1999 report (RX 1):

IMPRESSION/DISCUSSION: At this time, we have a patient who is 27 years post-injury. It is not until this year, in September, that he developed right knee pain. I see no evidence in the notes or in the patient's history that his right knee problem is due to his 1972 injury. I believe this is probably a degenerative tear of anterior horn of the lateral meniscus. His pain complaints are not consistent with a meniscal injury, **i.e.**, he has complaints of pain noted by both Dr. Fechter and myself during examination on both joint lines. An arthroscopy may be indicated for this patient but, frankly, I would not recommend it and I do not think the need for arthroscopy is a result of his 1972 injury. The patient's subjective complaints at this time are of bilateral knee pain. His objective findings are of tenderness to palpation of both joint lines, not specifically the lateral joint line only. His diagnosis is lateral meniscal tear of the right knee with bilateral knee pain. There is no causal relationship of the right knee to the 1972 workers' compensation injury. I do not understand how Dr. Fechter could say the altered gain pattern caused the tear, since tears are either caused by degenerative changes or by a twisting injury, and the patient has no history of injury. I do not think an altered gait pattern, which I did not see on short examination of his gait today, would cause such a tear. I doubt that the patient would benefit from an arthroscopy but I think if he continues to complain of symptoms that it would be reasonable to do one. I believe the patient has reached maximum medical improvement. I think this patient, regarding his 1972 injury, needs to be seen approximately on a yearly basis or on a p.r.n. basis regarding his left hip problem. I am surprised that it appears that he has not had an x-ray of his lumbar spine or cervical spine, at least not that I could tel in the notes, despite multiple visits for complaints of neck and back pain with Dr. Mininberg, according to the doctor.

Dr. Cohen's **Curriculum Vitae** is in evidence as RX 2.

Claimant's physical therapy records between October 8, 1982

and July 22, 1999 are in evidence as CX 7.

The D.C. District Director also referred Claimant for an examination by Dr. Easton Manderson, an orthopedic surgeon, and the doctor reports as follows in his March 11, 2000 report (RX 3):

Independent examination is requested by the Department of Employment Services, Government of the District of Columbia.

Questions needed to be answered: Whether the Claimant's right knee developed a condition as a direct result, latent or otherwise, of the work injury of 09/26/72, the necessity of recommended surgery requested as it relates to the Claimant's right knee condition, and if not, in my opinion, this condition is casually related to the original injury of 09/26/72.

Complaint: Right knee discomfort. Duration: Five years. He has difficulty with walking and standing with occasional giving way. He has difficulty with walking and standing because of pain.

History of Present Illness: The patient was doing construction work when while bending over there was a cave-in type accident that knocked him over causing him to fall, and according to the history, he sustained a dislocation of the left hip with a fracture of the left acetabulum. The medical record contains his treatment, and his treatment and follow-up are a matter of clear record.

Past surgical history also includes a right hand injury where he lost the index finger at the age of 18 secondary to a gunshot wound.

Medications: Tranxene for "nerves" according to the patient. He also takes medicine for seizures, which he states were accident related. The patient is diabetic and takes insulin. He is also hypertensive and takes hypertensive medication. He also takes Celebrex for pain and inflammation...

Dr. Manderson concluded as follows (**Id.**):

Clinical Impression:

1. Left hip post-traumatic changes more so seen in the acetabular side of the left hip consistent with previous

trauma.

2. There are degenerative arthritic changes involving the right knee.

Comment: Based on the history, the patient did not give a history of injuring his right knee at the time of the incident involving his left hip. In the past history, there is also no information suggesting injury to the right knee. The medical records do not support any injury to the right knee at the time of the incident on 09/26/72 or subsequently. Therefore, it is my opinion that the problems with the right knee are degenerative and not posttraumatic, and although he may need arthroscopic intervention for the right knee, this would only be based on the development of degenerative changes and not because of post-traumatic incident. I do not believe that his right knee problems at this time are related to the date of injury on 09/26/72, according to the doctor.

Dr. Manderson's **Curriculum Vitae** is in evidence as RX 4.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and

his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is

established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant’s employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim “in the absence of substantial evidence to the contrary.” 33 U.S.C. §920(a). **See Shorette,**

109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to negate the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v.**

United Food and Commercial Workers, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal**

Maritime Services Corp., 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a Claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If this Employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his right knee problems and his need for

surgery, resulted as the natural and unavoidable consequences of his September 26, 1972 work-related injury. The Employer has introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the

aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As noted above, the sole issue is whether or not Claimant's right knee problems and his need for surgery therefor are causally related to his September 26, 1992 devastating accident as the natural and unavoidable consequences of such injury, an issue I shall now resolve in the section dealing with Claimant's need for surgery on his right knee.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v.**

Ingalls Shipbuilding Division, Litton Systems, Inc., 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant timely advised the Employer of his need for surgery timely and requested appropriate medical care and treatment. However, the Employer did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and

in the interests of justice as the Employer refused to accept the claim.

The parties deposed Dr. Mininberg on December 5, 2000 (CX 8) and the doctor reiterated his opinions and testified forthrightly that Claimant's right knee problems are causally related to his September 26, 1972 injury and the doctor's opinions did not waver in the face of cross-examination by Respondents' counsel.

I have considered the parties' submissions, their respective oral argument and Claimant's post-hearing brief and I agree completely with the Claimant for the following reasons.

As noted, the single issue presented in this case is whether or not Claimant's right knee condition is the direct result of the serious injuries he sustained in the accident on which this claim is based. As established by the evidence in the record, Claimant's right knee condition is the direct result of the injuries he sustained on September 26, 1972 as the natural and unavoidable consequences thereof.

Claimant was injured on September 26, 1972. In that accident he "sustained a fractured pelvis, a dislocated left hip, a cracked right hip, a sciatic nerve palsy with a drop foot." (CX 8 p. 7) As a direct result of those injuries, Claimant has developed an altered gait.[1] (CX 8 p. 10 11, 13-21) In fact, Dr. Mininberg indicated that

> when you have a dislocated hip that's painful with limitation of motion, you don't have the same flexibility. When you have a drop foot, you have to alter your gait pattern. He eventually got tired of wearing a drop foot brace, so he would alter his gain so that he could swing his knee up so that his foot would clear the ground. Because a brace, you know, its cumbersome. He would try, you know. It's no different than putting braces on your teeth, after while you want to - these kids want to rip them often throw them away. And that's basically what Mr. Tullis

[1]This Administrative Law Judge noticed that Claimant walked about the courtroom with a very noticeable limp and altered gait.

> did and he altered his gait pattern so he could ambulate without his drop foot brace.

(CX 8 at 11) Dr. Mininberg explained the absence of references to altered gait in his records between 1975 and 1997. Specifically, he testified that he did not indicate that Claimant had an altered gait pattern because “it’s undeniable, the man has a drop foot and a brace on his foot, obviously his gate pattern has to be altered with a drop foot and a brace. One doesn’t have to say that every time. The bottom-line is if he’s got a sciatic nerve palsy with a left drop foot, by definition he has to have an altered gait.” Dr. Mininberg indicated that the presence of Mr. Tullis’ altered gain was “too obvious to mention...” (See CX 8, p. 24 11.7-16)

Finally, Dr. Mininberg explained that Claimant’s right knee injury, a torn horn of the medial meniscus was the “direct result of the injuries he suffered in September of 1972" (**see** CX 8 at 17) Dr. Mininberg, in explaining the mechanism of that injury, explained that Claimant “had a life altering, devastating injury. He had a drop foot deformity. When you have that kind of injury to your hip with a drop foot deformity, you must alter your gait pattern in order to ambulate. Depending on his altered gait patter he eventually had problems I believe first with his left knee and later with his right knee.”

Dr. Mininberg has treated Claimant for three (3) motor vehicle accidents which have occurred since September 26, 1992. He specifically testified that Claimant did not injure either of his knees in any fashion in the motor vehicle accidents which took place in 1993, 1998 or 2000. Dr. Mininberg made clear that he was not relating Claimant’s right knee injury directly to the accident of 1972. Rather, Dr. Mininberg explained that the right knee condition resulted “directly from the altered gate pattern as a result of the accident in 1972. The altered gate pattern is related to his dislocated, impaired hip and his devastating sciatic nerve injury.” The injuries which Claimant sustained, not the accident itself, are the sole cause of the right knee problems.

As noted above, Claimant also was seen by John B. Cohen, M.D., a medical examiner of the Carrier’s choosing. Dr. Cohen, on the basis of that one examination, opined that “there is no causal relationship of the right knee to the 1972 workers

compensation injury. I do not understand how Dr. Fechter could say the altered gate pattern caused the tear, since tears are either caused by degenerative changes or by a twisting injury, and the patient has no history of injury, I do not think an altered gait pattern, **which I did not see on short examination of his gait today**, would cause such a tear." (EX 1 at 4) This opinion is directly at odds with and unsupported by the body of Dr. Cohen's medical evaluation. Specifically, in the physical examination portion of his report, Dr. Cohen points out that Claimant "has a mildly antalgic gait on the left side." Also of importance, Dr. Cohen's report is silent as to the presence of the left foot drop deformity from which Claimant unarguably suffers. These two glaring errors in Dr. Cohen's report require that it be given no weight. At minimum, these two glaring errors again gravitate against affording the opinion of Dr. Cohen greater weight than the opinion of Dr. Mininberg. (Emphasis added)

Similarly, the opinion of Dr. Manderson is given little or no weight because Dr. Manderson failed to address the issue presented herein. Claimant contends that his right knee condition is a consequence of the 1972 injury. The question which was presented to Dr. Manderson was "whether the Claimant's right knee condition developed as a direct result, latent or otherwise, of the work injury of 1972..." Dr. Manderson was not asked whether or not the knee condition from which Claimant suffers is the natural and unavoidable consequences of his altered gait. During his examination, Dr. Manderson observed Claimant limping during the examination and favoring the right leg. Dr. Manderson's opinion, consistent with Dr. Mininberg, is that the "problems with the right knee are degenerative and not post-traumatic." This is consistent with Dr. Mininberg's opinion that the right knee problem developed as a result of years from walking with a limp and overusing the right leg. Also of importance in Dr. Manderson's report were the reports of the bilateral x-ray examination of Claimant's knees. Those x-rays revealed that "there were degenerative changes mild to moderate in the patellafemoral area and the medial compartment of the right knee. There were no such changes in the left knee. The joint intervals were normal in the left knee. (EX 3) After years of limping to favor the left hip and foot drop, Mr. Tullis developed right knee complaints. He does not have bilateral arthritis which would be more consistent with the opinion of Dr. Cohen than the opinions of Dr. Mininberg and Dr. Manderson.

As noted above, in **Sir Gean Amos, Petitioner v. Director, Office of Workers' Compensation Programs; Sea-land Services, Inc.**, 153 F.3d 1051 (9th Cir. 1998), the United States Circuit Court addressed the weight to be afforded to the opinion of the treating physician. Specifically, the court indicated that "[w]here an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to special weight. As we have explained in the context of Social Security cases, 'we afford greater weight to a treating physician's opinion because 'he is employed to cure and has a greater opportunity to know and observe the patient as an individual.'" **Magallanes v. Bowen**, 881 F.2d 747, 751 (9th Cir. 1989)(quoting **Sprague v. Bowen**, 812 F.2d 1226, 1230 (9th Cir. 1987)). The same logic applies in cases involving industrial Injuries. A similar standard has been adopted by both the United States Court of Appeals for the Second Circuit in **Anthony Pietrunti v. Director, Office of Workers' Compensation Programs**, 119 F.3d 1035 (2nd Cir. 1997), **citing**, **Rivera v. Harris**, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians entitled to considerable weight").

In **Amos, supra**, the Court found that both the opinions of the treating physician and the opinions of the medical examiners selected by the employer and insurer were reasonable. Further, neither medical examiner of the employer and insurer's choosing suggested that the treating physician's recommendation was unreasonable. Similarly, in the instant case, all of the physicians concede that Claimant has significant right knee pathology. They simply differ on its etiology. At worst, the opinions of each physician can be deemed "reasonable," and I so find and conclude.

In **Amos**, the court indicated that since the opinion of the treating physician was entitled to special deference, and since that opinion was not shown by the testimony of the other doctors to be unreasonable, the ALJ's choice of one reasonable option over the other was not hers to make. As a result, the ALJ's rejection of the treating physician's opinion was not supported by substantial evidence. Similarly, rejection of Dr. Mininberg's reasonable opinion here would not be supported by substantial evidence, and I so find and conclude.

This Administrative Law Judge, applying the Logic of the **Amos** and **Pietrunti** cases to this claim, finds and concludes his right knee condition is causally connected to the 1972

accidental injury on which this claim is based, as the natural and unavoidable consequences thereof. This decision is consistent with both the facts of this case and the law which affords special weight to the opinion of the treating physician.

As found above, Dr. Mininberg, the treating physician has opined that the right knee problems are the result of years of an altered gait pattern. As the treating physician, he has seen Claimant over 100 times. He is in a unique position to determine the causes of Claimant's orthopedic problems. There is little difference between the qualifications of the treating physician and the physician retained by the Employer for purposes of this litigation. Moreover, there is nothing in the record to warrant disregarding the opinions of either treating physician in favor of any of the employer's medical evaluators, and I so find and conclude.

The **Amos** and **Pietrunti** cases suggest that the opinions of the treating physician, where reasonable, be given substantial weight. As this Court finds that the opinions of Dr. Mininberg and Dr. Cohen and Dr. Manderson are reasonable, the opinion of Dr. Mininberg should, as a matter of law, be given greater weight.
Accordingly, I find and conclude that Claimant's right knee condition is causally related to the 1972 accidental injury on which this claim is based.

Intervening Event

The issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related 1972 accident or whether the three motor vehicle accidents constituted an independent and intervening event attributable to Claimant's own conduct, thus breaking the chain of causality between the work-related injury and any disability he may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an

> independent intervening cause [event] attributable to claimant's own intentional conduct.
>
> Professor Larson writes at Section 13.11:
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (**Id**. at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is not a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons**

Hospital, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar does not involve a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's negligent intentional act broke the chain of causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960). Nor is this a case involving a subsequent incident on the way to the doctor's office for treatment of the original work-related accident. **Fitzgibbons v. Clarke**, 205 Minn. 235, 285 N.W.2d 528 (1939); **Laines v. WCAB**, 40 Cal. Comp. Cases 365, 48 Cal. App. 3d 872 (1975). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. **See Kearney v. Shattuck**, 12 A.D.2d 678, 207 N.Y.S.2d 722 (1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed under him, while attempting to repair his television antenna.

Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held, "[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley**, **supra**, at 652.

Applying these well-settled legal principles to the case at bar, and based upon the totality of the record, I find and conclude that Claimant's motor vehicle accidents do not constitute an intervening cause which is attributable only to Claimant's own conduct and which broke the chain of causality between Claimant's work-related incident and his present condition for the following reasons.

Claimant was involved in a motor vehicle accident on March 16, 1993 and he was treated by Dr. A. Roy Rosenthal, an associate of Dr. Mininberg, and the doctor states as follows in his two page report (RX 5):

CHIEF COMPLAINT: Neck, low back

PRESENT ILLNESS: The patient is a 52 year old male who is 6 ft. 1 in. tall and weighs 249 pounds. He was the driver involved in a motor-vehicle accident on 3-16-93. He was wearing a seat belt. The patient complains of pain in the neck and low back; numbness, tingling and weakness in both arms and both legs. No bladder/bowel dysfunction. He was not working before the accident. The patient states there is a prior history of above injury. He received treatment for prior injury and there are residuals.

PHYSICAL EXAMINATION:

On examination of the CERVICAL SPINE there is significant muscular spasm and tenderness BILATERALLY with limited range of flexion. There is an increase in symptomatology on extension of the cervical spine associated with BILATERAL RADICULOPATHY into both upper extremities. Anterior flexion is limited to 40% of normal. Neurological examination is otherwise within normal limits as to sensory and deep tendon reflexes and motor examination. The carotid arteries are equal bilaterally. Range of motion of the upper extremities is within normal limits. There is no abrasion or laceration.

Examination of the LUMBOSACRAL SPINE reveals limited flexion and extension with associated muscular spasm and tenderness palpated BILATERALLY. There is limited bilateral lateral flexion as well as rotation to 60% of normal with increased pain on extension and decreased anterior flexion to 60% of normal. There is positive straight leg raising bilaterally at 75**N** with NO ASSOCIATES RADICULOPATHY. Gait heel and toe walking are within normal limits. There are no lacerations or abrasions. Neurological examination is otherwise intact as to motor, deep tendon reflexes, and sensory aspects. The extensor hallucis longus and vascularity is equal bilaterally. There is limited range of motion of the left hip. There is no pain on palpation of the course of the sciatic nerves, SI joints, or the sciatic notches.

X-RAY:

CERVICAL SPINE: There are degenerative changes with calcification the anterior longitudinal ligament between C3, 4, 5, 6, and 7. There is no evidence of fracture, dislocation, or soft tissue calcification. The joint spaces are within normal limits.

PELVIS & HIPS: There are early degenerative changes left hip.

LUMBOSACRAL REGION: There is traction osteoarthritic lipping superior anterior aspect of L4. No evidence of fracture, dislocation, spondylolysis, spondylolisthesis, or soft tissue calcification. The SI joints and sciatic notches are visualized and are with normal limits.

DIAGNOSIS: Cervical and lumbosacral strains.

TREATMENT: I explained the pathology to the patient. I feel the findings are directly related to and compatible with the

injury sustained on 3-16-93. Presently unemployed and permanently disabled over the last 20 years. Continue with the thoraco-lumbar brace which he presently has. Supplied with a cervical collar. Presently taking Flexoril and Naprosyn. Return in a week and a half, according to the doctor.

Dr. Rosenthal saw Claimant as needed and, as of October 28, 1993, Dr. Rosenthal reported that Claimant had completely recovered from the effect of his motor vehicle accident as of October 28, 1993, that he had returned to the **status quo ante** he enjoyed prior to the March 16, 1993 motor vehicle accident and he was discharged to return only as necessary. (RX 5)

As Claimant had recovered from his March 16, 1993 motor vehicle accident as of October 28, 1993, I find and conclude that such motor vehicle accident does not constitute an independent and intervening event severing the connection between his September 26, 1972 accident and his current right knee problems and his need for surgery. The record does not contain any reports from the other two motor vehicle accidents.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer and Carrier (Respondents). Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the informal conference. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the

compensation award shall be administratively verified by the District Director.

It is therefore **ORDERED** that:

1. The Employer and Carrier ("Respondents") shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including authorization of and payment of the surgical procedure(s) recommended by Dr. Mininberg as soon as possible, subject to the provisions of Section 7 of the Act.

2. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl